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8 Attorneys for Use Plaintiff  
9 NATIONAL STEEL AND METALS, INC.

10 UNITED STATES DISTRICT COURT

11 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA, ) Case No. **'12CV0329 DMS MDD**  
13 for the use and benefit of NATIONAL )  
14 STEEL AND METALS, INC., a California ) COMPLAINT OF NATIONAL STEEL AND  
15 corporation, ) METALS, INC. FOR/ON:  
16 Plaintiff, )  
17 v. )  
18 NEI CONTRACTING AND )  
19 ENGINEERING, INC., a California )  
20 corporation, INTERNATIONAL FIDELITY )  
21 INSURANCE COMPANY, a New Jersey )  
22 corporation; )  
23 Defendants. )  
24 \_\_\_\_\_ JURY TRIAL REQUESTED  
25  
26  
27  
28

20 Use Plaintiff NATIONAL STEEL AND METALS, INC. complains and alleges as  
21 follows:

22 **GENERAL ALLEGATIONS**

- 23 1. Jurisdiction of this cause of action is conferred by 40 U.S.C. 3131 through 3134 (the  
24 "Miller Act").  
25 2. Venue is proper in the United States District Court for the Southern District of  
26 California because the contracts for which the Miller Act payment bonds were issued were  
27 performed within this judicial district of the United States.  
28

3. Use Plaintiff, NATIONAL STEEL& METALS, INC. (hereinafter referred to as "NATIONAL STEEL"), is and was at all times mentioned a California corporation organized by and existing by Virtue of the Laws of the State of California and maintaining its principal place of business in San Diego, California, and is authorized and licensed by the State of California to perform the work described below.

4. Use Plaintiff NATIONAL STEEL is informed and believes and thereupon alleges that Defendant INTERNATIONAL FIDELITY INSURANCE COMPANY (hereinafter referred to as "FIDELITY") is and at all times herein mentioned was a corporation organized under the laws of the State of New Jersey and is authorized to transact business as a surety upon bonds or undertakings in the State of California, and is within the jurisdiction of this Federal Court.

5. Use Plaintiff NATIONAL STEEL is informed and believes and thereupon alleges that Defendant NEI CONTRACTING AND ENGINEERING, INC. (hereinafter referred to as "NEI") is and at all times herein mentioned was a corporation organized under the laws of the State of California with its principal place of business in Chula Vista, California, and is within the jurisdiction of this Federal Court.

## **FIRST CAUSE OF ACTION**

**(Miller Act Bond)**

(Against Defendants FIDELITY AND NEI)

6. On or about September 13, 2010, NEI Contracting and Engineering, Inc. (“NEI”) was awarded a contract by the United States of America, through the Department of the Navy, designated Contract No. N62473-10-D-5481/0012, for the construction of a work of improvement at MCAS Miramar commonly referred to as “P214 Solar Carports and Lighting Retrofit MCAS Miramar” (hereafter referred to as the “Prime Contract”).

7. Pursuant to said Prime Contract No. N62473-10-D-5481/0012 , NEI , as principal, and FIDELITY, as surety, executed and delivered a certain payment bond in penal sum required by law, whereby Defendant FIDELITY guaranteed the payment to all persons supplying labor and

1 material in the prosecution of the work provided for in said Prime Contract and any and all duly  
2 requested and/or authorized modifications thereof. Said bond was executed and delivered as  
3 aforesaid in accordance with the provisions of 40 U.S.C. 3131 through 3134 (the Miller Act). A  
4 copy of said bond is attached hereto as Exhibit "A" and made of part hereof.

5       8. Thereafter, and during the performance and prosecution of the work provided for in  
6 said Prime Contract, Use Plaintiff NATIONAL STEEL entered into a written subcontract  
7 agreement with NEI in the amount of Two Hundred Seventy-Six Thousand, Five Hundred Sixty-  
8 Seven Dollar (\$276,567.00) for the performance and prosecution of a part of the work prescribed  
9 in Prime Contract No. N62473-10-D-5481/0012 between NEI and the United States of America.  
10 A copy of said subcontract is attached hereto as Exhibit "B" and made a part hereof.

11       9. During the course of the performance and prosecution of said Federal public work, and  
12 under and by virtue of said Prime Contract between NEI and the United States of America, and  
13 said subcontract agreement, NATIONAL STEEL performed certain structural metal and metal  
14 decking work and related and incidental work required and designated under the Prime Contract  
15 to be accomplished, and other like labor, materials, and equipment including extras and change  
16 orders in the prosecution of the work provided in said contract with the United States of  
17 America.

18       10. NATIONAL STEEL has performed each condition, covenant and promise upon its  
19 part to be performed under the aforesaid written subcontract agreement and changes thereto  
20 requested by the United States Government and NEI, or such performance has been excused or  
21 waived.

22       11. Said labor, material, and equipment so furnished by NATIONAL STEEL in the  
23 prosecution of said subcontract, plus extras, change orders and extended overhead and delay  
24 costs, is reasonably worth the sum of \$276,567.00. Of that sum, the amount of \$211,902.37 has  
25 been paid, and there is an outstanding balance due to NATIONAL STEEL for said work or  
26 services in the amount of \$64,664.63.

27       12. Demand for payment of said sums has been made on NEI, as principal, and upon  
28

1 || FIDELITY, as surety. Notwithstanding said demand, FIDELITY and NEI have jointly and  
2 || severally refused to pay all or part of said sum.

3           13. As a proximate result of NEI's failure to pay when due the value of the contract and  
4 extra work performed by NATIONAL STEEL, Use Plaintiff has suffered damages in the amount  
5 of \$64,664.63, or other amount according to proof at trial, plus interest at the legal rate on that  
6 sum from the date such payment was due and owing, the exact date of which is unknown at this  
7 time. Use Plaintiff will amend this complaint when such date is ascertained upon leave of court  
8 to do so.

9       14. The work performed by NATIONAL STEEL under its subcontract with NEI was last  
10      performed less than one year from the date of the filing of this complaint, the last of which was  
11      performed on or about August 24, 2011.

12           15. A period of 90 days has now elapsed since National Steel last provided labor,  
13 services, materials, equipment or supplies to NEI for inclusion in the Project.

14           16. Use Plaintiff is informed and believes and thereupon alleges that the subcontract  
15 between NEI and Plaintiff NATIONAL STEEL contained a clause entitling the prevailing party  
16 in any action to be awarded reasonable attorneys fees. Use Plaintiff therefore believes under  
17 existing case law and/or statute that it is entitled to its reasonable attorneys' fees for prosecuting  
18 this action against Defendants FIDELITY and NEI.

19        17. Use Plaintiff is informed and believes and thereupon alleges that it is entitled under  
20 the Federal Statute known as the Prompt Payment Act and codified as Federal Acquisition  
21 Regulation F.A.R. 52-232-27 (April 1989) to interest and penalties for late payment in an amount  
22 to be determined at the trial of this action.

## **SECOND CAUSE OF ACTION**

#### (Breach of Contract)

(Against Defendant NEI )

26       18. Plaintiff NATIONAL STEEL incorporates herein by reference each preceding  
27 paragraph as though the same were set forth in full herein.

19. NATIONAL STEEL has performed all conditions, covenants, and promises under its subcontract with NEI on its part to be performed or such have been waived or excused.

20. At a time certain NEI breached the aforesaid subcontract, attached hereto as Exhibit "B," by failing and refusing to make payments to NATIONAL STEEL as required by said subcontract.

21. As a proximate result of NEI's failure to pay NATIONAL STEEL when due, the value of said subcontract and extra work performed by NATIONAL STEEL, Plaintiff has suffered damages in the amount of \$64,664.63, plus interest at the legal rate from a date according to proof at trial.

22. The subcontract between NEI and Plaintiff NATIONAL STEEL contains a clause entitling the prevailing party in any action to be awarded reasonable attorneys' fees. Use Plaintiff therefore is entitled under existing case law and/or statute to its reasonable attorneys fees for prosecuting this action against Defendants FIDELITY and NEI.

23. Use Plaintiff is informed and believes and thereupon alleges that it is entitled under the Federal Statute known as the Prompt Payment Act and codified as Federal Acquisition Regulation F.A.R. 52-232-27 (April 1989) to interest and penalties for late payment against Defendant NEI in an amount to be determined at the trial of this action.

24. Use Plaintiff is informed and believes and thereupon alleges that it is entitled under California's Prompt Payment Act and codified at California Business and Professions Code Section 7108.5 to interest and penalties for late payment in an amount to be determined at the trial of this action, plus attorneys' fees.

### **THIRD CAUSE OF ACTION**

**(Common Counts-Open Book Account, Account Stated)**

(Against Defendant NEI)

25. Plaintiff NATIONAL STEEL incorporates herein by reference each preceding paragraph as though the same were set forth in full herein.

26. Within the last four years and/on or about a date certain at San Diego, California,

1 Defendant NEI became indebted to Plaintiff under the subcontract in the sum of \$64,664.63, plus  
2 interest at the legal rate from a date according to proof, on an open book account for labor,  
3 materials and equipment furnished to Defendant NEI, and/or because an account was stated in  
4 writing by and between Plaintiff and Defendant NEI in which it was agreed that NEI was  
5 indebted to Plaintiff, and which Defendant agreed to pay to Plaintiff upon billing.

6        27. \$276,567.00 is the reasonable value of the labor, materials and equipment furnished  
7 to Defendant under the subcontract, \$64,664.63 of which remains unpaid despite Plaintiff's  
8 demand, plus pre-judgment interest according to proof at the maximum rate allowable by law  
9 from a date according to proof at trial.

10 28. Plaintiff is entitled to attorneys' fees by an agreement or a statute according to proof.

## **PRAYER FOR RELIEF**

WHEREFORE, PLAINTIFF NATIONAL STEEL AND METALS, INC. prays for judgment as follows:

## **ON THE FIRST CAUSE OF ACTION**

**(Against Defendants NEI and FIDELITY)**

16        1. For damages in the sum of \$64,664.63, together with interest thereon at the legal rate  
17 from the date(s) due, to be ascertained by the Court;

18        2. For interest and penalties for late payment as so authorized by the Prompt Payment  
19 Act, as mentioned in Federal regulation F.A.R. 52-232-27 (April 1989);

20       3. For reasonable attorneys' fees and costs of suit incurred herein according to statute,  
21 agreement or applicable case law; and

22 4. For such other and further relief as the Court may deem just and proper.

## ON THE SECOND AND THIRD CAUSES OF ACTION

(Against Defendant NEI )

25        5. For damages in the sum of \$64,664.63, together with interest thereon at the legal rate  
26 from the date(s) due, to be ascertained by the Court:

27 6. For interest and penalties for late payment as so authorized by the Prompt Payment

Act, as mentioned in the Federal regulation F.A.R. 52-232-27 (April 1989), and/or California Business and Professions Code Section 7108.5;

7. For reasonable attorneys' fees and costs of suit incurred herein according to statute, agreement or applicable case law; and

8. For such other and further relief as the Court may deem just and proper.

Dated: 2-8-12

S/Thomas M. Finrow

Thomas M. Finrow, Esq.

Attorney for Use Plaintiff NATIONAL STEEL AND  
METALS, INC. INC.

**DEMAND FOR JURY TRIAL**

Use Plaintiff NATIONAL STEEL AND METALS, INC. hereby demands a trial by jury in the above captioned action.

Dated: 2-8-12

S/Thomas M. Finrow

Thomas M. Finrow, Esq.

Attorney for Plaintiff NATIONAL STEEL AND  
METALS, INC. INC.

JS 44 (Rev. 12/07)

**CIVIL COVER SHEET**

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

**I. (a) PLAINTIFFS**

**National Steel and Metals, Inc., a California corporation**

(b) County of Residence of First Listed Plaintiff San Diego

(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Thomas M. Finrow, Esq.

9131 Fletcher Parkway Suite 125  
La Mesa, CA 91942 619-469-4181**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

1 U.S. Government Plaintiff

X-3 Federal Question -yeb  
(U.S. Government Not a Party)

2 U.S. Government Defendant

4 Diversity  
(Indicate Citizenship of Parties in Item III)

**DEFENDANTS** NEI Contracting and Engineering, Inc., a California corporation; International Fidelity Insurance Company, a New Jersey corporation

County of Residence of First Listed Defendant

San Diego

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

**'12CV0329 DMS MDD****III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF	PTF	DEF	
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

- 110 Insurance  
 120 Marine  
 130 Miller Act  
 140 Negotiable Instrument  
 150 Recovery of Overpayment & Enforcement of Judgment  
 151 Medicare Act  
 152 Recovery of Defaulted Student Loans (Excl. Veterans)  
 153 Recovery of Overpayment of Veteran's Benefits  
 160 Stockholders' Suits  
 190 Other Contract  
 195 Contract Product Liability  
 196 Franchise

- PERSONAL INJURY**  
 310 Airplane  
 315 Airplane Product Liability  
 320 Assault, Libel & Slander  
 330 Federal Employers' Liability  
 340 Marine  
 345 Marine Product Liability  
 350 Motor Vehicle  
 355 Motor Vehicle Product Liability  
 360 Other Personal Injury

- PERSONAL INJURY**  
 362 Personal Injury - Med. Malpractice  
 365 Personal Injury - Product Liability  
 368 Asbestos Personal Injury Product Liability  
**PERSONAL PROPERTY**  
 370 Other Fraud  
 371 Truth in Lending  
 380 Other Personal Property Damage  
 385 Property Damage Product Liability

- PERSONAL INJURY**  
 610 Agriculture  
 620 Other Food & Drug  
 625 Drug Related Seizure of Property 21 USC 881  
 630 Liquor Laws  
 640 R.R. & Truck  
 650 Airline Regs.  
 660 Occupational Safety/Health  
 690 Other

- PERSONAL PROPERTY**  
 422 Appeal 28 USC 158  
 423 Withdrawal 28 USC 157

- PERSONAL INJURY**  
 400 State Reapportionment  
 410 Antitrust  
 430 Banks and Banking  
 450 Commerce  
 460 Deportation  
 470 Racketeer Influenced and Corrupt Organizations  
 480 Consumer Credit  
 490 Cable/Sat TV  
 810 Selective Service  
 850 Securities/Commodities Exchange  
 875 Customer Challenge 12 USC 3410  
 890 Other Statutory Actions  
 891 Agricultural Acts  
 892 Economic Stabilization Act  
 893 Environmental Matters  
 894 Energy Allocation Act  
 895 Freedom of Information Act  
 900 Appeal of Fee Determination Under Equal Access to Justice  
 950 Constitutionality of State Statutes

- 210 Land Condemnation  
 220 Foreclosure  
 230 Rent Lease & Ejectment  
 240 Torts to Land  
 245 Tort Product Liability  
 290 All Other Real Property

- 441 Voting  
 442 Employment  
 443 Housing/ Accommodations  
 444 Welfare  
 445 Amer. w/Disabilities - Employment  
 446 Amer. w/Disabilities - Other  
 440 Other Civil Rights

- HABEAS CORPUS:**  
 510 Motions to Vacate Sentence Habeas Corpus:  
 530 General  
 535 Death Penalty  
 540 Mandamus & Other  
 550 Civil Rights  
 555 Prison Condition

- IMMIGRATION**  
 710 Fair Labor Standards Act  
 720 Labor/Mgmt. Relations  
 730 Labor/Mgmt. Reporting & Disclosure Act  
 740 Railway Labor Act  
 790 Other Labor Litigation  
 791 Empl. Ret. Inc. Security Act

- IMMIGRATION**  
 861 HIA (1395ff)  
 862 Black Lung (923)  
 863 DIWC/DIWW (405(g))  
 864 SSID Title XVI  
 865 RSI (405(g))

- IMMIGRATION**  
 870 Taxes (U.S. Plaintiff or Defendant)  
 871 IRS—Third Party 26 USC 7609

**V. ORIGIN**

(Place an "X" in One Box Only)

1 Original Proceeding

2 Removed from State Court

3 Remanded from Appellate Court

4 Reinstated or Reopened

5 Transferred from another district (specify)

6 Multidistrict Litigation

Appeal to District Judge from Magistrate Judgment

40-0270 yeb

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

40 U.S.C. Section 3131-3134

Brief description of cause:

Action on Miller Act Payment Bond

**VII. REQUESTED IN COMPLAINT:**

CHECK IF THIS IS A CLASS ACTION

UNDER F.R.C.P. 23

DEMAND \$

\$64,664.63

CHECK YES only if demanded in complaint:

JURY DEMAND:  Yes  No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

February 2, 2012

S/Thomas M. Finrow

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFFP

JUDGE

MAG. JUDGE